FILE COPY

IN THE

Supreme Court of the United States

October Term, [redacted] 1953

No. [redacted] 111

JULES POND,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH F. RANK,
649 South Olive Street,
Los Angeles 14, California,

RUSSELL K. LAMBEAU,
P.O. Box 2899, Term. Annex,
Los Angeles 54, California,

Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Jurisdiction 1

Question presented 1

Statement 2

Reasons for granting the writ 3

Appendices:

Appendix A. Letter of International General Electric Company, dated August 24th, 1950, giving Pond's record of seventeen years' of service ..... App. p. 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 4

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Baker v. Warner, 231 U. S. 588, 34 S. Ct. 175, 58 L. Ed. 384	3, 7
Erick Bowman Rem. Co. v. Jensen Salsbery Lab., 17 F. 2d 255, 52 A. L. R. 1187	3, 8
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817	3, 9, 10

STATUTE

United States Code, Title 28, 1254(1)	1

TEXTBOOKS

Harper & James, The Law of Torts (1956), Secs. 5.4, 5.5, 5.6, 5.27	8
Prosser on Torts (2d Ed.), p. 582	8
3 Restatement of Law of Torts, Sec. 563	8
12 Southern California Law Review, p. 231, Pleading in Libel Actions in California	9
Townshend on Slander and Libel, Sec. 308	9
Townshend on Slander and Libel, Sec. 335	9

IN THE

Supreme Court of the United States

October Term, 1957

No. .....

JULES POND,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on April 1, 1958.

The Opinion of the Court of Appeals is printed in Appendix B hereto, *infra*, pages 4-11.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Shall the United States courts countenance blacklisting of employees by employers by confining actionable defamation to obvious cases of libel *per se?*

Statement.

Appellant sued in the District Court upon four causes of action for defamation arising from four identical letters written by respondent purporting to answer four individual letters written by four separate prospective employers of appellant inquiring about respondent's knowledge of appellant, appellant having been in the employ of respondent's organization for 17 years.

The District Court granted respondent's motion to dismiss the Complaint for failure to state a cause of action and the Court of Appeals affirmed the lower court's judgment of dismissal.

The Complaint details several pages of circumstances and special facts which show that the recipients of the letters would properly attach the meaning from the four letters alleged in the Complaint rather than the obvious literal meaning urged by respondent. Without the factual background set forth in the Complaint, the letters would appear to be innocuous. The special facts alleged are such that the harmful meaning was unmistakable, and so clearly so that all four recipients of the offending missives understood them in their actionable sense and as a result thereof refused to employ appellant. The publication of the injurious material was actuated by malicious motives by respondent's agents and duly ratified by respondent.

The lower courts held that, because the libel was not readily apparent from the face of the offending letters, no facts pleaded as inducement and innuendo could show that any harmful meaning was intended or could be in fact conveyed to the recipients.

Reasons for Granting the Writ.

The decision of the court below is in direct conflict with the cases of *Baker v. Warner*, 231 U. S. 588, 34 S. Ct. 175, 58 L. Ed. 384, and *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.* (C. C. A. Minn., 1926), 17 F. 2d 255, 258, 52 A. L. R. 1187.

As recently as the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817, this Court has had occasion in a defamation action to reverse the rulings of lower courts in denying the litigant his day in court by erroneously ruling the Complaint insufficient to state a claim for relief.

We are here concerned with an important phase of the law of defamation. Its end result upon workers is nothing short of involuntary servitude. A worker has no source for his employment record but his employer. If he cannot obtain redress against an employer who misrepresents and distorts his employment record he dare not quit. In less enlightened societies such as the U. S. S. R. the freezing of workers to their jobs is one of the disagreeable incidents of their forced-labor economy. In our country the untrammeled right of a worker to move about for his own advancement or self-satisfaction has ever been one of our cherished freedoms. It must be defended and maintained as jealously as we would fight for freedom of speech and freedom of religion. Most employers properly regard the service records of their employees as a trust. If an enviable record accumulated laboriously over the span of two decades can be arbitrarily and arrogantly destroyed as was Pond's, what security remains for the career company man? As one nears or passes the age of fifty the problem of job finding is difficult enough even with a correct report of previous employment records. To be professionally discredited is unthinkable.

No employer has better right to mutilate his employee's record than to convert or embezzle his employee's pension fund or his social security deposits. General Electric did just that with its subtly conceived instrument whereby to damn Pond with faint praise. All four recipients of the offending letters so understood them.

No government pretending to foster and protect free institutions can sanction a practice which is tantamount to blacklisting. The lower courts have approved a model reply to any prospective employer who would ask G.E. about Pond's record. For all time to come G.E. is encouraged and authorized to reduce Pond's record from the 17-year summary epitomized by Appendix A to the professed "know-nothing" prevarication sent to the four inquirers herein. The result reached here is the more revolting because Pond did nothing to incur the wrath of his former employer. He voluntarily resigned after 17 years of exemplary service.

Both lower courts excused the reply letters upon the ground that "silence is not libel." But that question was not before the court. General Electric *did not remain silent*. G.E. undertook to answer the letters of inquiry. The four inquirers asked a total of 23 specific inquiries concerning Pond. G.E. did not refuse to answer; it purported to answer all four of the letters, but in such a manner as falsely to imply that none of the 23 inquiries could be answered favorably to Pond. The replies left no room for doubt that G.E.'s files were replete with negative information about appellant, indicating that answers to the subjects of inquiry were available but were not being supplied because the replies would necessarily be adverse to Pond. All four of the inquirers so understood the reply. In truth and in fact, Pond's record was impeccable.

Misconceiving the record, the Opinion of the lower court says that the sting of the letter (complained of) is the statement that the company would not re-employ Pond; (Appx. B p. 11) that it is not alleged to be false. This ignores the allegations of Paragraph XIII of the Complaint which says:

> "That in truth and in fact, as the defendant at all times well knew, there was nothing pertaining to plaintiff's service with defendant which would justify a reply of the tenor aforesaid. . . . That defendant had no reasonable grounds to believe that plaintiff's record or that his qualifications were other than satisfactory."

It would seem that in the four months that elapsed from the time of argument and submission to the rendering of its decision the Court of Appeals should have been more familiar with the contents of the Complaint.

A prospective employer inquires about the loyalty of the previous employee of G.E. The inquiry is answered by G.E. so as to make it plain that G.E. knows all about its ex-employee. Trivial details are supplied which had not been requested, but the reply makes no mention of loyalty. The concluding comment by G.E. is a gratuitous statement that it would not, on his record, re-employ Pond. There is nothing in his record justifying an adverse reply, but the inescapable inference is that G.E. cannot favorably report on his loyalty. Neither Pond nor the inquirers asked G.E. for its recommendation. G.E. was asked only for facts or comment.

The same prospective employer inquires about a man's competence and his honesty. A service letter (Appx. A) addressed to the employee at the time of his resignation reflects most favorably upon the subject's competence. That

letter is seen by the prospective employer. But the service letter is addressed to the ex-employee. It may or may not be genuine. It even shows that the ex-employee occupied the high position of Chief Engineer. The reply letter carefully avoids confirmation of a single favorable fact set forth in the service letter. By no hint is its authenticity confirmed or ratified. G.E. was unwilling to admit that Pond had ever served in an engineering capacity or in any other particular capacity. He may have spent 17 years as a janitor or running errands for all that could be gleaned from the reply letters. All four recipients of the reply letter could only, and did, conclude that the service letter (Appx. A) was counterfeit. So proficuous were the reply letters in disowning the service letter of August 24, 1950, that even the Court of Appeals indicates a feeling of doubt on the subject.[1] Says the Court, "But, if his record was that good, it would have been necessary to discover why he left the employment." None of the four inquirers sought information as to why appellant left G.E. No such issue was presented by the Complaint which the Court of Appeals was examining.[2] The seeds of doubt implanted by the offending letters were so potent that the Court of Appeals cannot resist questioning the accuracy of the reason for Pond's leaving as stated in the service letter (Appx. A), albeit required by all the rules of pleading to accept the allegations of the Complaint at face value.[3]

The Court of Appeals argues that the omissions from the service letter of any reference to appellant's honesty,

---

[1]In its brief appellee concedes the genuineness of the service letter. (App. Br. p. 2).

[2]The cause was under submission 4 months after oral argument. It took the Court 4 months to determine that the letters were so plainly worded as to be incapable of the defamatory meaning.

[3]Paragraph IV of the Complaint alleges every fact and statement in the service letter to be true.

integrity, loyalty to the United States or his desirability as a security risk is an important circumstance. Such omissions are termed "patent and manifest." (Appx. B p. 9.) The Opinion goes on to say that "all the favorable sides of the record of Pond were laid out in detail" (in the service letter). His 17-year record as to honesty and integrity, loyalty to the United States and his desirability as a security risk, was entirely satisfactory and was alleged to be so (in par. XIII of the Complaint). If such omissions from the service letter were "patent and manifest," why were their omissions from the offending letters not likewise patent and manifest? And why was not the appellee legally required to portray the true picture of Pond regarding such "admirable characteristics" rather than to create the opposite inference by patent and manifest omission? G.E.'s recommendation was not sought and comment on its obligation to recommend, or the lack thereof, is quite beside the point. Appellee's duty to give a true and fair report is the actual question, appellee having assumed to answer at all.

Nothing detrimental appears at first blush upon the face of the offending letters. They appear to be inocuous upon their face; ergo, they are not actionable, reasons the Circuit Court. Were this true there would be no such thing as inducement in the law of libel. Extrinsic aids to interpretation would have no use. They would not be permitted.

Such is not the law. This Court in *Baker v. Warner*, 231 U. S. 588, 594, 34 S. Ct. 173, 58 L. Ed. 384, said:

> "But there is a middle ground where though the words are not libelous per se, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that

> class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must determine whether those facts when coupled with the words, make the publication libelous. Van Vechten v. Hopkins, 5 Johns. 219."

and the Eighth Circuit consistently therewith in *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.*, 17 F. 2d 255, 258, 52 A. L. R. 1187, said:

> "Where words are not actionable per se, it is necessary to plead by way of inducement such extrinsic facts as will render the words actionable and to connect such extrinsic facts by proper colloquium with the particular words. (Citing cases including Baker v. Warner.) The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction, and render it actionable, where, standing alone and not thus explained, the language would apear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and per se refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege by way of inducement, the existence of such extraneous matter."

To the same effect are:

Prosser on Torts (2nd Ed.), p. 582;

Harper & James, The Law of Torts (1956), Secs. 5.4, 5.5, 5.6, 5.27;

3 Restatement of the Law of Torts, Sec. 563.

The Restatement of Torts and Dean Prosser's work, both on the subject of libel, were cited by this Court in *Joint Anti-Fascist Refugee Committee v. McGrath, supra.*

An article in 12 Southern California Law Review entitled "Pleading in Libel Actions in California," the following appears at page 231:

> ". . . When the words used are capable of two meanings, one defamatory and one innocent, the plaintiff frequently must plead not only (by way of innuendo) that the words were used and understood in the defamatory sense, but also (by way of inducement) circumstances indicating that the words were understood in the defamatory sense. Events antedating the publication frequently must be pleaded to support the innuendo, e.g., to show the situation or information of the readers of the words was such that they derived the defamatory meaning from them.[1] Without pleading such inducement, the mere selection and statement by plaintiff of an innuendo may be entirely insufficient. Thus it has been declared again and again that an innuendo may not introduce a meaning broader than the words naturally bear or introduce new matter, or enlarge the natural meaning of words. Therefore, unless the plaintiff supports his innuendo by the pleading of an inducement, he runs the risk of having the innuendo stricken on the ground that the words used are incapable of

---

[1](From Townshend on Slander and Libel, Secs. 308 and 335):

"It is the office of the inducement to set forth the extrinsic circumstances which, coupled with the language uttered, affects its construction and makes it actionable, where standing alone the language used would appear not to affect the plaintiff injuriously. . . . It has been frequently held that the inducement is necessary where the language does not naturally per se convey the meaning which plaintiff would attribute to it."

> the innuendo which he has selected. If, on the other hand, the plaintiff has pleaded an inducement showing that those in the situation of the readers of the words reasonably would have understood them in the defamatory sense selected by the innuendo will stand."

The right of employees not to have their hard-earned employment records garbled and distorted seems to us to be too fundamental to require extended exposition. His employment record is the most precious accumulation of the rank and file worker. It is his security for future employment. It is a species of property. It should not be taken from him without due process. General Electric has the unquestioned right to give its bona fide opinion of its employees. This case does not involve an opinion expressed in good faith. It involves not an opinion at all; rather it is a malicious misrepresentation of a spotless record.

The novelty of the device employed by appellee should not supply it with a cloak of immunity. As this Court aptly said in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 159, 71 S. Ct. 624, 95 L. Ed. 817, 847:

> "The novelty of the injuries described in these petitions does not alter the fact that they present the characteristics which have in the past led this Court to recognize justiciability."

And further at page 171 (341 U. S. and p. 854 of 95 L. Ed.):

> "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying the Bill of Rights. The validity and moral authority of a conclusion largely

depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness."

Through the device employed by appellee Pond has been branded as a traitor, as an incompetent, as a thief without any of the processes normally and usually accorded to the lowliest. Due process demands that Pond be given a hearing.

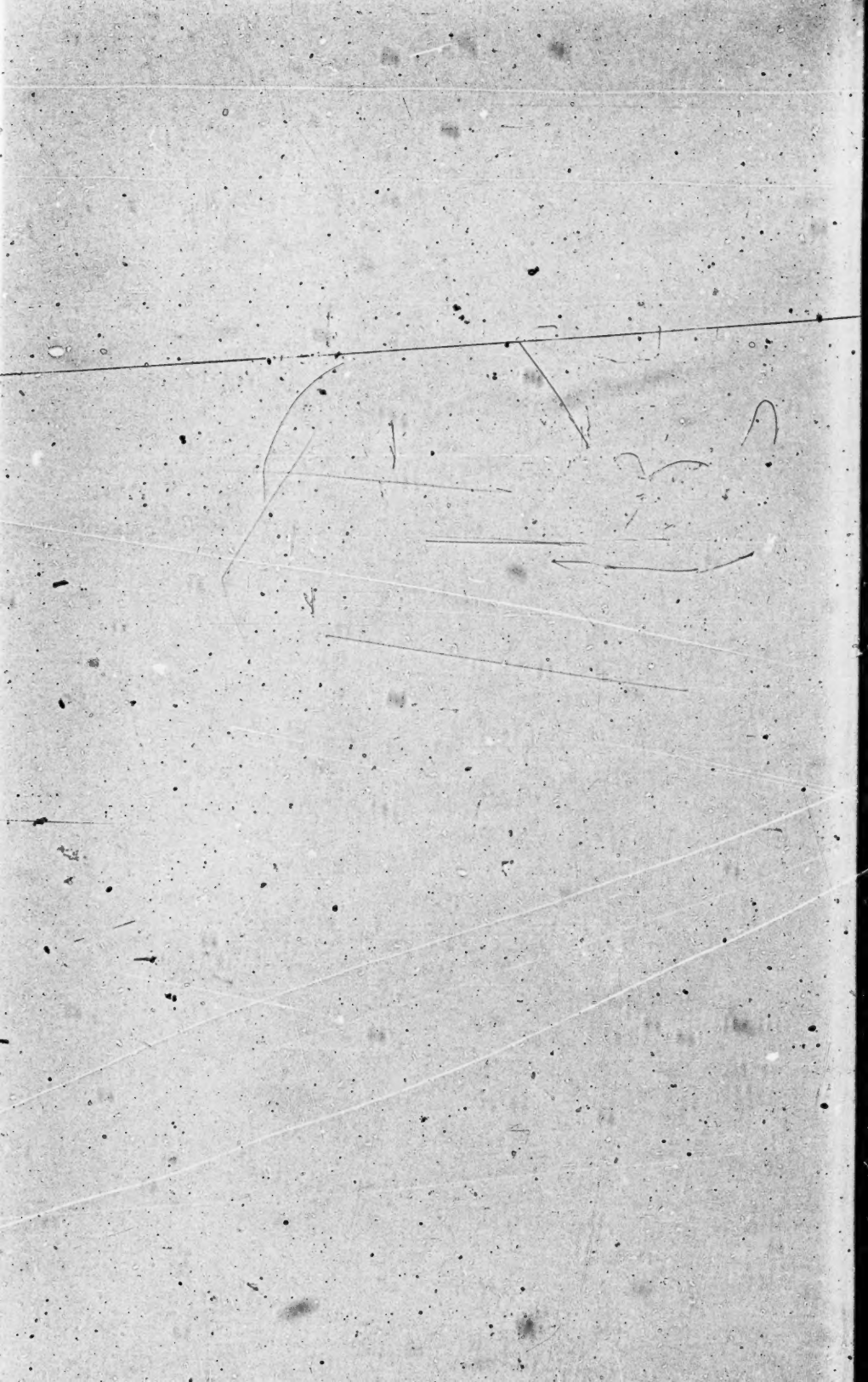
For the foregoing reasons a Writ of Certiorari should issue.

Respectfully submitted,

JOSEPH F. RANK,

RUSSELL K. LAMBEAU,

Attorneys for Petitioner.



APPENDIX A.

EXHIBIT A.

[Letterhead]

International General Electric Company

August 24th, 1950.

CRT-1617.
Mr. Jules Pond,
Room 1107,
11 Broadway,
New York 4, N. Y.

Dear Mr. Pond:

This is to verify that during the past seventeen years you have been in the employ of this organization in the following capacities:

Nov. 13, 1933—Sept. 1, 1934

Application Engineer, General Electric Appliances, S.A., Buenos Aires, Argentina; training of sales crews, estimates, designs and preparation of service manuals.

Sept. 1, 1934—March 1, 1937

Refrigeration Engineer, General Electric, S.A., Buenos Aires, Argentina: organization of service shops for power and light companies in inland provinces and training of technical personnel; sales of food conservation and industrial jobs; local manufacturing of fixtures and parts; and letting of contracts for related materials and labor.

March 1, 1937—Feb. 1, 1942

Air Conditioning Engineer, G.E.S.A. Buenos Aires, Argentina; sales of industrial process and comfort central plant installations; contracting; personnel training; institution work with power and light companies.

Feb. 1, 1942—Oct. 31, 1945

Manager, Installation & Service Department, G.E.S.A. Argentina; supervision of erection, shop repair and field service of all G.E. installations (steam electric power plants, refrigeration and air conditioning, appliances, electronics, etc.) and electromechanical maintenance of G.E.S.A. office and factory building.

Dec. 10, 1945—Aug. 22, 1949

Chief Engineer, Air Conditioning & Commercial Refrigeration Division, I.G.E. Co. New York Office; training of engineers for foreign field; supervision of quotations for special jobs; collaboration with G.E. factories in design adaptations for export; and issue of commercial engineering circular letters for I.G.E. distribution network; including personally conducted market survey of South & Southeast Asia and the Far East during nine months round-the-world 1948-49 tour of duty.

Aug. 22, 1949—to date

Special Representative of I.G.E. in Thailand (Siam); negotiation of acceptance of I.G.E. project on Hydro-electric Development by Siamese Government and assistance to distributor related to bids on Diesel Electric Locomotives for the State Railways and on Steam Turbine Generating Sets for the Power Authority.

On your return from your assignment in Thailand, you submitted to the undersigned your resignation from this Company based on your belief that your prospects with the Company were unsatisfactory.

While you were with the Air Conditioning and Commercial Refrigeration Department here in New York, you had the title of Chief Engineer of this department. In this capacity you were in charge of the engineers on air conditioning and commercial refrigeration equipment and also in charge of the training of personnel to go to the foreign field. While training the personnel for the foreign field, you have shown that you have the ability to arouse the enthusiam and personal loyalty of your subordinates. You also accompanied the sales engineers of our Apparatus Department on calls to the customers and were helpful in closing orders for refrigeration and air conditioning equipment.

We have always had a high opinion of your engineering ability and feel that your long experience in the air conditioning and refrigeration fields qualifies you particularly for engineering work in these fields.

In August of 1949, you received an important assignment as Special Representative for the International General Electric Co. in Bangkok, Thailand, to assist our distributor in his negotiations covering diesel electric locomotives for the State Railways and steam turbine generator sets for the Power Authority. Our distributor has assured us in letters that he has written that you assisted him in every way possible and that you were well liked by the Siamese people in general as well as by the members of his organization.

Please be assured that you have our sincere best wishes for success in your future activities.

Yours very truly,

/s/ C. R. TUNELL.

Manager, New York Division.

CRTunell:AMT[13]

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Jules Pond, Appellant, vs. General Electric Company, a Corporation, Appellee. No. 15,520. Apr. 1, 1958.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: FEE and CHAMBERS, Circuit Judges, and CHASE A. CLARK, District Judge

JAMES ALGER FEE, Circuit Judge:

Jules Pond brought an action against General Electric Company for damages on account of the publication of four supposed libels. The trial court sustained a motion to dismiss the amended complaint and, upon refusal of Pond to plead further, entered judgment dismissing the action. This appeal followed.

The "First Amended Complaint—Damages—Defamation" set up allegations outlined below. Pond is a qualified engineer, who had been employed in Argentina, Asia and the United States by International General Electric Company and foreign subsidiaries thereof for some seventeen years. He resigned in 1950. He was given a service letter by the Company, wherein his various assignments and positions with the Company were set out in detail. It is related therein that he resigned because he believed his prospects with the Company were unsatisfactory. The letter, which contained references to his personality and his professional ability in rather glowing terms, concluded with hopes for his success in the future. The complaint then expressly alleges there was an "express understanding" between Pond and the Company that Pond could use this letter "for the purpose of obtaining employment" and that the Company "would provide prospective future em-

ployers of plaintiff with the same facts as were recited in this letter and "would answer any other inquiries that it could answer in accordance with the facts." It is also alleged that all the persons to whom Pond reported during his employment are alive. It is then pleaded that Pond sought employment in 1956 from four different firms, the agents of which purportedly read the letter above referred to. Each of these wrote a letter asking specific questions concerning the honesty, loyalty, competency, responsibility, ability to get along with people, desirability as a security risk and any other comments as to the ability and character of Pond. The letter in response to each of these inquiries was set out in full as an exhibit to the complaint. It reads:

> "This is in reply to your letter of March 12 in which you request information concerning Mr. Jules S. Pond.
>
> "The official in International General Electric to whom Mr. Pond reported passed away several years ago, and I am unable to give you first-hand information concerning him. His personnel record with the Company indicates that he had approximately 17 years of service in the International General Electric family. His initial engagement was with General Electric S.A., Argentina. During the early 40's he came to the United States of his own volition, seeking opportunity for engagement here while in the process of securing naturalization as a U.S. citizen. He was hired by International General Electric after his arrival in the United States, and was assigned to our Air Conditioning and Refrigeration Department. Our records further indicate that he submitted his resignation on August 9, 1950, which was accepted by mutual agreement.

"Insofar as I can determine from his records, we would not be prepared to consider him for re-engagement.

Very truly yours,
CHARLES MENTZER,
Specialist-Personnel."

It is alleged that the statement that the official to whom Pond reported had died was false. It is alleged that it was untrue that the writer was unable to give first-hand information about him. It is set up that the letter was worded as it was because of personal malice and ill will of certain employees of the Company.

It is claimed by innuendo that the prospective employer was given the impression that the service letter might not be authentic or correct, that the Company files contained much information unfavorable to Pond, and that it could not give a favorable report or recommendation as to him. The pleading indicates that the Company should have repeated the detailed information in the service letter. It was claimed the Company should have answered specifically questions about the ability, loyalty and other characteristics of Pond, and should have included favorable statements which it is alleged were borne out by his record. It is specifically alleged that the Company knew that, before plaintiff became a citizen of this country, his surname had been Podnossof, that he was born in Poland, that he had attended primary and high schools in Soviet Russia and that he had lived in the U.S.S.R. It is further alleged that the Company knew any prospective employer of plaintiff would know such facts and be sensitive to any comment or attitude of a former employer as to his loyalty and his desirability as a security risk. It is alleged that

the Company knew that plaintiff was not a security risk, that his loyalty was above reproach, and that his honesty and integrity were deserving of a favorable recommendation. It is alleged that the disclaimer of personal knowledge by the writer and the gratuitous suggestion that from his records the Company would not be prepared to consider him for reengagement would magnify the negative character of the reply, and the omissions would be more pointed and the recipient so understood them.

Affirmatively, it is alleged that the information contained in the reply was of little or no interest to the prospective employers, that his service with the Company had been entirely satisfactory, and that he was an exceptionally competent engineer.

Ordinarily, a motion to dismiss should not be granted. Where there is any doubt about the character of the action, doubts should be resolved in favor of the pleader. If there is a possibility that a good claim has been stated defectively, the precedents indicate the motion should be denied. However, these rules do not apply to the instant complaint.

It is unquestionable that a cause of action in libel is attempted. The pleader was no novice. Technically, the pleading is excellently done. But a cause of action is not stated. None could be stated.

A casual glance at the reply letter shows that it is not and could not be libelous per se. Nor is the letter in question reasonably susceptible to a defamatory meaning in light of the surrounding extrinsic facts pleaded by way of inducement.

A detailed study of the writing proves that there is nothing defamatory contained therein.[1] Where such a plainly worded communication is set out as the basis of complaint, the innuendo can serve no purpose.[2] The device of innuendo and detailed inducement was adopted here to explain the words of a writing as defamatory. But this process cannot cause a letter, plainly worded, to be libelous, by failing to interpret the words themselves and by imputing a defamatory and malicious meaning to the lacunae therein.[3] Silence is not libel. A perfunctory answer to an inquiry is not defamation. A former employee cannot force an employer to give him a favorable recommendation, even if the records show all the facts such as those here alleged. Even if the complaint be taken as true in all respects, the former employer might not have cared to recommend Pond for social reasons. The mere fact that a prospective

---

[1] "* * * it is for the court to determine whether, in the light of such extrinsic facts as are alleged, the writing can be a libel." Mellen vs. Times-Mirror Co., 167 California 587, 593. See also Maher v. Devlin, 203 California 270, 278.

[2] "* * * if the words under no circumstances could convey a defamatory meaning, then no innuendo can make them defamatory." Washer vs. Bank of America, 21 California 2d 822, 828. See also Emde vs. San Joaquin County Central Labor Council, 23 California 2d 146, 159; Koenan vs. Dean, 134 Cal.App.2d 189, 195; Lorentz vs. R.K.O. Radio Pictures, 9 Cir., 155 F.2d 84, 87.

[3] Illustrative is the example given by the California Supreme Court in Bates vs. Campbell, 213 California 438. There the court said that the statement, "It would probably serve no useful purpose to recite the circumstances leading to the request for [plaintiff's] * * * resignation which in pursuance to such request, was received and accepted * * *" could not be construed to mean that the plaintiff was discharged because unfit to occupy the position. The court said "the statement quoted * * * makes no reference whatever, either expressly or impliedly, to appellant's fitness or unfitness to occupy such position, and is not therefore reasonably open to the construction attempted to be placed on it." Bates vs. Campbell, supra, page 443.

employer might draw inferences from silence or a perfunctory answer is of no assistance to Pond.

There is a circumstance also of some importance. The original service letter of the Company, which is set out in the complaint, is subject to the same criticisms which Pond directs to the reply. There was no mention of the honesty or integrity of Pond therein. There is no word as to the loyalty of Pond to the United States or as to his desirability as a security risk. There is no explanation of the reason why Pond resigned from International General Electric, except it resulted from the belief of Pond that his prospects with that Company were unsatisfactory.

The omissions of the service letter are patent and manifest. No business man would read it without the sense that many things had been omitted. Pond alleged inferentially that each of the prospective employers had read the original letter. If so, any one of them would undoubtedly have written for an explanation of his resignation after seventeen years of service upon an excuse so palpably inadequate. All the favorable sides of the record of Pond were laid out in detail. But, if his record was that good, it would have been necessary to discover why he left the employment. However, the Company was under no duty to say upon request or otherwise. If there had been some reason, which the Company did not care to disclose, why it permitted Pond to resign or why it probably would not reemploy him, it would not have been ethical in commercial circles for the Company to recommend him.

Further, there is no duty upon a former employer to recommend one upon the basis of honesty and integrity, even if it knows its former employee to possess these admirable characteristics. If, as plaintiff alleges, the Company would know that prospective employers would dis-

cover plaintiff had a foreign surname and was born, educated and lived in a foreign country and would be sensitive to the attitude of a former employer, there was certainly no duty placed upon the Company to explain the facts or defend Pond against any implications which might, according to him, be drawn therefrom.

The trial court also held that the communications claimed to be defamatory were qualifiedly privileged. Pond has pleaded facts which constitute a defense to his claims.[4] The occasion was qualifiedly privileged. It is shown in each case that a person interested in employing Pond and in his qualifications and record requested the Company, who was interested in the record of Pond, for information relating to his qualifications.[5] Under the statute, malice is not inferred from the communication. California Civil Code, §§ 47, 48. As has been noted above, the fact that the ethics of the business world entered into the situation is of major importance. But malice of the employees of the Company is expressly pleaded. The allegations are probably mere conclusions, but we should not stand upon the technicalities of pleading. Therefore, the qualified privilege was nullified on the face of the pleading.

But the amended complaint did not state a cause of action. Nor could it have been amended so as to state a claim. Pond confessed that he had no further facts to add by allegation when he refused to plead further.

---

[4] "Privilege must be pleaded as an affirmative defense to an action for libel * * * except where the existence of the privilege is disclosed on the face of the complaint." Locke vs. Mitchell, 7 California 2d 599, 602.

[5] "A privileged publication * * * is one made—
* * *

"3. In a communication, without malice, to a person interested therein * * * [by one] (3) who is requested by the person interested to give the information." California Civil Code, § 47.

A libel is a false and unprivileged publication by writing. California Civil Code, § 45. The amended complaint does not allege that this communication is false in any material particular. This letter is not libelous on its face. The allegation of the extrinsic facts by inducement, by colloquium or by innuendo did not make it so. No further facts of which the court conceives could make this writing false or defamatory. The gist of the claim is that the Company did not speak or write. A former employee cannot compel his former employer to give him a recommendation. The sting of the letter is the statement that the Company would probably not reemploy Pond (after he had had seventeen years of service with it). But that statement is not alleged to be false and must be taken to be true.

Affirmed.

(Endorsed:) Opinion. Filed Apr. 1, 1958.

Paul P. O'Brien, Clerk.

E COPY

Office-Supreme Court, U.S.
FILED
JUL 11 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 111

JULES FOND,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

E. AVERY CRABY,
Suite 700,
612 South Flower Street,
Los Angeles 17, California,
Attorney for Respondent.

MESERVE, MUMPER & HUGHES,
ROBERT A. STEWART, JR.,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	PAGE
The opinion below	1
Jurisdiction	1
Statutes	2
Question for review	3
Statement of the case	3
Argument	8
I.	
No federal question is presented	8
II.	
The judgment below accords with controlling decisions on the state law of libel	8
III.	
The judgment below does not conflict with decisions in other circuits or with decisions of this court	11
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baker v. Warner, 231 U. S. 588, 34 S. Ct. 175, 58 L. Ed. 384	11
Bates v. Campbell, 213 Cal. 438, 2 P. 2d 383	10
Chavez v. Times-Mirror, 185 Cal. 20, 195 Pac. 666	10
Chicago Title & Trust Co. v. Fox Theatres Corp., 69 F. 2d 60	7
Ellis v. Cates, 178 F. 2d 791	7
Emde v. San Joaquin Labor Council, 23 Cal. 2d 146, 143 P. 2d 20	10
Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, 17 F. 2d 255	11
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188	8
Gang v. Hughes, 111 Fed. Supp. 27	8
Hearne v. De Young, 119 Cal. 670, 52 Pac. 150	10
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817	11
Keith v. Endicott Johnson Corp., 75 F. 2d 249	7
Kithcart v. Metropolitan Life Ins. Co., 62 Fed. Supp. 93, aff'd 150 F. 2d 997, cert. den. 326 U. S. 777, rehear. den. 326 U. S. 812, rehear. den. 327 U. S. 813	7
Lorentz v. R.K.O. Radio Pictures, 155 F. 2d 84	11
Lowe v. McDonald, 221 F. 2d 228	7
Mellen v. Times-Mirror, 167 Cal. 587, 140 Pac. 277	9
Morse v. Lewis, 54 F. 2d 1027	7
Vedovi v. Watson & Taylor, 104 Cal. App. 80, 285 Pac. 418	10
Yudin v. Carroll, 57 Fed. Supp. 793	7

RULES PAGE

Federal Rules of Civil Procedure, Rule 12(b), Subd. 6....1, 5, 6

STATUTES

California Civil Code, Sec. 44 2

California Civil Code, Sec. 45 2

California Civil Code, Sec. 45a 2

California Civil Code, Sec. 47 2

California Civil Code, Sec. 48 3

United States Code Annotated, Title 28, Sec. 1254(1) 1

United States Code Annotated, Title 28, Sec. 1652 8

TEXTBOOKS

30 California Jurisprudence 2d, p. 684 8

30 California Jurisprudence 2d, pp. 723-724 9

31 California Jurisprudence 2d, p. 54 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

JULES POND,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

The Opinion Below.

The opinion of the Court of Appeals has not yet been reported. There was no opinion by the District Judge (Honorable Ben Harrison).

Jurisdiction.

Judgment of the Court of Appeals affirming judgment of the District Court dismissing petitioner's first amended complaint for damages for defamation on motion of respondent under subdivision 6 of Rule 12(b) F.R.C.P. was entered April 1, 1958 [R. 43]. There was no petition for rehearing. Jurisdiction of this court under 28 U. S. C. A., Section 1254(1) has been invoked by petition for certiorari filed July 17, 1958.

Statutes.

The following provisions of the Civil Code of the State of California regarding actionable defamation are relevant:

California Civil Code, Section 44:

"§44. *Defamation, what.* Defamation is affected (effected) by:

1. Libel;
2. Slander."

California Civil Code, Section 45:

"§45. *Libel, what is.* Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

California Civil Code, Section 45a:

"§45a. (*Libel on its face: Definition: Defamatory language not libelous on its face, when actionable.*) A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

California Civil Code, Section 47:

"§47. (*Privileged publication or broadcast: What constitutes.*) A privileged publication or broadcast is one made—

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

* * * * * * * *

California Civil Code, Section 48:

"§48. (*Same: When malice not inferred.*) In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication."

Question for Review.

The single question presented is whether under applicable state law the letter set out hereinafter can be the basis of an action for libel on the extrinsic facts alleged in the first amended complaint.

Statement of the Case.

The facts of the case are taken as they appear from the allegations of the first amended complaint [R. 3-15], which is abstracted in the opinion of the Court of Appeals [R. 36]. Briefly, petitioner Pond (plaintiff and appellant below) left the employment of International General Electric Company (I. G. E.)[1] in 1950, taking with him a service letter [R. 15-18], summarizing his record over a period of 17 years in generally complimentary terms, except for the statement that he had resigned be-

---

[1]Then a subsidiary, now a division of respondent, General Electric Company.

cause he believed his prospects with the Company were unsatisfactory. Pond has never expressed dissatisfaction with this letter, although it said nothing about his honesty, integrity, loyalty to the United States, or desirability as a security risk.

Six years after his employment by I. G. E. had terminated, Pond (who by this time was a resident of California) applied for work in California, using the service letter as a reference. Four prospective California employers addressed routine inquiries to International General Electric. Each received in reply a letter [R. 19] in form as follows, which Pond has attempted to make the basis for a libel suit, alleging [R. 6-7] the statements here italicized to have been false:[2]

> "This is in reply to your letter of March 12 in which you request information concerning Mr. Jules S. Pond.
>
> *"The official in International General Electric to whom Mr. Pond reported passed away several years ago,* and *I am unable to give you first-hand information concerning him.* His personnel record with the Company indicates that he had approximately 17 years of service in the International General Electric family. His initial engagement was with General Electric S.A., Argentina. During the early 40's he came to the United States of his own volition, seeking opportunity for engagement here while in the process of securing naturalization as a U. S. Citizen. He was hired by International General Electric after

[2]Pond states (Pet. 5) that the last sentence was also alleged to have been false, but the statement is not convincing [Cf. Par. VII, R. 6, specifying statements in said letter alleged to be false with Par. XIII, R. 9], nor did Pond file a petition for rehearing.

his arrival in the United States, and was assigned to our Air Conditioning and Refrigeration Department. Our records further indicate that he submitted his resignation on August 9, 1950, which was accepted by mutual agreement.

"Insofar as I can determine from his records, we would not be prepared to consider him for re-engagement.

Very truly yours,
CHARLES MENTZER
Specialist—Personnel"

The first amended complaint alleges that I. G. E. in 1950 had agreed to repeat the details of the service letter on occasion [R. 5], and further alleges that by reason of certain silences and omissions of the reply letters, in the understanding of the recipients petitioner stood accused of dishonesty, disloyalty, incompetence and forgery of the service letter [R. 7-9].

On motion of respondent under subdivision 6 of Rule 12(b) F. R. C. P., petitioner's first amended complaint was dismissed when he declined leave to further amend, the court finding [R. 29]:

> "That the facts as alleged in plaintiff's first amended complaint and claim do not establish or provide an interpretation of the letters alleged to have been maliciously sent by defendant company beyond the natural sense of the published words and that said letters in light of the extrinsic facts alleged are not fairly suspectible of the defamatory meaning sought to be attributed to them . . ."

The Court of Appeals affirmed [R. 43]. It is to be noted that on its own motion the Court of Appeals ordered

a supplemental transcript [R. 34] and had before it all the portions of the record not theretofore transmitted, thus treating the motion to dismiss as a motion for summary judgment under Rule 12(b) F. R. C. P.

This is a libel suit. Petitioner's problem is instantly apparent. The reply letters are simply not defamatory, and contain no material false statement. Such statements as were allegedly false are not defamatory on any state of facts which could conceivably be alleged. Pond's real grievance is not that the reply letters were defamatory, but that (in his opinion) they did not constitute favorable letters of recommendation. His complaint is not that I. G. E. said anything bad about him, but that it failed to say something good.

The inherent defect of petitioner's case is that he has not stated, and is not able to state, a cause of action for libel. He has attempted to gloss over this in several ways. He has persistently asserted a perpetual duty on the part of I. G. E. as a former employer to furnish an exhaustive reply and favorable recommendation in response to inquiries from prospective employers, as if the action were one for specific performance or breach of contract. Petitioner's principal contention now seems to be that by the judgment below he has been deprived of his day in court and some amorphous civil liberty or constitutional right thereby infringed. The fact is, however, that petitioner has pleaded such extrinsic facts and circumstances as he contends makes the reply letters actionable defamation. The same were duly considered by the District Judge [R.

29] and by the Court of Appeals [R. 39]. Petitioner declined the opportunity to allege such other extrinsic facts as might have occurred to him [R. 29]. As the Circuit Judge said [R. 41]: "Pond confessed that he had no further facts to add by allegation when he refused to plead further." He was at all times represented by counsel.

Petitioner's claim that his employer of six years past was bound by contract or duty to give him a more favorable recommendation may be asserted in his other action[3] pending in the same court before the same judge, in which on the same facts he complains on the theories of negligence and breach of contract.[4] On his libel action, he has had his day in court, but he has no case. Again in the words of the Circuit Judge [R. 39]:

> "It is unquestionable that a cause of action in libel is attempted. The pleader was no novice. Technically, the pleading is excellently done. But a cause of action is not stated. None could be stated."

---

[3] *Pond v. General Electric Company*, No. 19870-BH Civil, United States District Court, Southern District of California, Ceneral Division.

[4] This circumstance was properly brought to the judicial notice of the Court of Appeals (App. Br. 8). *Yudin v. Carroll*, 57 Fed. Supp. 793 (W. D. Ark. 1944); *Kithcart v. Metropolitan Life Ins. Co.*, 62 Fed. Supp. 93 (W. D. Mo. 1944), aff'd 150 F. 2d 997, cert. den. 326 U. S. 777, rehear. den. 326 U. S. 812, rehear. den. 327 U. S. 813; *Lowe v. McDonald*, 221 F. 2d 228 (9th Cir. 1955); *Morse v. Lewis*, 54 F. 2d 1027 (4th Cir. 1932); *Ellis v. Cates*, 178 F. 2d 791 (4th Cir. 1949); *Keith v. Endicott Johnson Corp.*, 75 F. 2d 249 (2nd Cir. 1935); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F. 2d 60 (2nd Cir. 1934).

ARGUMENT

I.

No Federal Question Is Presented.

The jurisdiction of the District Court rested upon diversity of citizenship, petitioner being a citizen and resident of the State of California, and respondent a New York corporation [R. 3]. The action is for libel. The letters of which petitioner complains were published in California. The case is governed by the law of the State of California pertaining to libel as expressed in its statutes and decisions. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; 28 U. S. C. A., Sec. 1652; *Gaig v. Hughes*, 111 Fed. Supp. 27 (S. D. Cal. 1953); 30 Cal. Jur. 2d 684.

II.

The Judgment Below Accords With Controlling Decisions on the State Law of Libel.

The Supreme Court and the intermediate appellate courts of the State of California have consistently held that it is the duty of the trial judge to determine whether or not, in the light of the extrinsic circumstances alleged, the language of a publication is reasonably capable of the defamatory meaning attributed to it by a pleaded innuendo. They have further held that where a communication is phrased in ordinary language which is clear and unambiguous, no innuendo can ascribe to it a meaning different from the plain meaning which the words naturally bear. If the trial judge finds that, on the extrinsic facts alleged, the language is not reasonably susceptible of defamatory meaning, the action should be dismissed.

30 Cal. Jur. 2d 723-724:

"Where the allegedly defamatory language is in the vernacular of the place of publication, it will be assumed that those who heard or read it understood it in the sense which properly belongs to it. Under such circumstances, the common import of the words must be applied to test its defamatory character. There is no room, in such a case, for the introduction of evidence of witnesses as to their understanding of the language."

31 Cal. Jur. 2d 54:

"It is not in the nature of an innuendo to beget an action, nor is that its purpose. Unless the words used can reasonably be understood in a defamatory sense, the innuendo cannot aid the pleader. Nor can an innuendo be used to give the words charged as defamatory an unnatural or forced meaning. It cannot ascribe to defamatory matter a meaning broader than the words actually used naturally bear, or broader than they bear when read in the light of the inducement. In other words, an innuendo cannot add to, enlarge, extend, or change the natural sense of the published words."

Mellen v. Times-Mirror, 167 Cal. 587, 593, 140 Pac. 277, 279 (1914):

"It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged, the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harm-

less and the other libelous, and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which sense the language was used and understood by the readers of the article. 'But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. (See *Van Vactor v. Walkup*, 46 Cal. 124, 133.)"

Bates v. Campbell, 213 Cal. 438, 442-443, 2 P. 2d 383, 385 (1931). Here the court declined to construe a general reference to a discharged employee's record as implying unfitness for the position held.

Emde v. San Joaquin Labor Council, 23 Cal. 2d 146, 159, 143 P. 2d 20, 28 (1943). The California Supreme Court here held that the statement that a dairy had violated its union contract did not permit the innuendo that the dairy was dishonest.

Chavez v. Times-Mirror, 185 Cal. 20, 25, 195 Pac. 666, 669 (1921). The California Supreme Court here held that the statement that a certain instance called for investigation by the State Bar Association was not capable of meaning that the attorney in question was unprofessional or corrupt.

Vedovi v. Watsan & Taylor, 104 Cal. App. 80, 87, 285 Pac. 418, 422 (1930). The District Court of Appeal held that a notice cancelling an insurance policy for nonpayment of premium was incapable of meaning that the premium had been misappropriated by the agent who allegedly had collected it.

Hearne v. De Young, 119 Cal. 670, 678, 52 Pac. 150, 153 (1898). The publication of a newspaper article re-

ferring to a murder, and stating that the plaintiff had been the family doctor and one of the first to arrive on the scene, was held not to permit the innuendo that the plaintiff was implicated in the murder.

The judgment of the Court of Appeals is entirely consistent with its prior decision applying California libel law in *Lorentz v. R. K. O. Radio Pictures*, 155 F. 2d 84, 87 (9th Cir., 1946).

III.

The Judgment Below Does Not Conflict With Decisions in Other Circuits or With Decisions of This Court.

The case upon which petitioner principally relies (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817) holds only that a complaint which states a cause of action for defamation should not be dismissed. Such holding in no way conflicts with the decision below, the petitioner here having failed to state a cause of action under applicable state law.

Other cases cited (Pet. 3) as in conflict do not involve California law, and appear to be wholly irrelevant. *Erick Bozeman Remedy Co. v. Jensen Salsbery Laboratories*, 17 F. 2d 255 (8th Cir. 1926), affirmed the dismissal of a complaint for libel which did not sufficiently allege special damages. *Baker v. Warner*, 231 U. S. 588, 34 S. Ct. 175, 58 L. Ed. 384, is entirely consistent with the decision below and with California statutes and decisions, for the court said (231 U. S. at 594), immediately preceding petitioner's quotation (Pet. 7):

> "Where the words are libelous *per se* the judge can so instruct the jury, leaving to them only the determination of the amount of damages. Where the

words are not libelous *per se*, and, in the light of the extrinsic facts averred, could not possibly be construed to have a defamatory meaning, the judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury."

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

E. Avery Crary,

Meserve, Mumper & Hughes, and

Robert A. Stewart, Jr.,

Attorneys for Respondent.